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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK RICHARD RAM, JR.,

Defendant and Appellant.

D060322

(Super. Ct. No. RIF149166)

APPEAL from a judgment of the Superior Court of Riverside County, Richard J. Hanscom, Ret. Judge, sitting on assignment. Affirmed as modified.

On August 19, 2010, a jury convicted Frank Richard Ram, Jr., of robbery in the second degree in violation of Penal Code<sup>1</sup> section 211 (count 1), assault with a deadly weapon in violation of section 245, subdivision (a)(1) (count 2) and active participation in a criminal street gang in violation of section 186.22, subdivision (a)(1) (count 3). The

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

jury further found Ram committed the first two offenses for the benefit of, or at the direction of, or in association with a criminal street gang with the specific intent to promote, or further or assist in criminal conduct by gang members within the meaning of section 186.22, subdivision (b)(1).

On October 12, 2010, the trial court sentenced Ram to a total of 12 years in state prison. Specifically, the court sentenced Ram to two years for the robbery and 10 years for the gang enhancement, two years for the assault and 10 years for the gang enhancement and two years for the gang participation conviction. The trial court further ordered that the sentences for the assault and gang participation convictions run concurrently with the 12-year sentence imposed on the robbery count.

Ram now appeals, claiming: (1) that there was insufficient evidence to support the jury's finding he committed the offenses for the benefit of a gang within the meaning of section 186.22, subdivision (b); (2) that the court erred by failing to preclude a witness's testimony under section 1054.1; (3) that Ram's concurrent sentence for participating in a criminal street gang (count 3) should have been stayed under section 654; and (4) that Ram's concurrent sentence for assault with a deadly weapon (count 2) should have also been stayed under section 654.

As we explain, with the exception of the sentence imposed for gang participation, we find no error. We modify the judgment to correct the sentencing error and affirm the judgment as modified.

## FACTUAL BACKGROUND<sup>2</sup>

Ram and Thomas Ramirez, two self-admitted Eastside Riva gang members, were at Ramirez's house on February 23, 2009. That day, Alfred Arenas and a female companion went to Ramirez's house to pick up some money Ramirez owed him. Arenas found Ramirez in the front yard and Ramirez appeared to be agitated. Ramirez apparently believed Arenas was being disrespectful by coming to his house, asking for money and bringing a woman; evidently, Ramirez's wife was extremely jealous. Ramirez went inside his house and came back out with Ram. Once back outside, Ramirez struck Arenas in the face, causing Arenas to fall to his knees. Ramirez and Ram then both punched and kicked Arenas in the face, ribs and upper torso for two to three minutes. Shortly after the beating began, Courtney Miller, a third party who was driving by, saw the assault.

After the barrage of punching and kicking stopped, one of the men reached into Arenas's back pocket, took out Arena's wallet, withdrew all the money in the wallet threw the wallet back at Arenas. Arenas later found his cell phone had been taken as well.

Once he was able to collect himself, Arenas fled to his truck and drove to a police station. Arenas filed a police report in which he described the assault and robbery;

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<sup>2</sup> We view the evidence in the light most favorable to the judgment of conviction. (See *People v. Osband* (1996) 13 Cal.4th 622, 690.) Certain portions of the factual and procedural history related to Ram's claims of alleged error are discussed *post*, in connection with those issues.

Arenas then went to the hospital. Both Ram and Ramirez were arrested shortly thereafter.

Sometime after Ram and Ramirez were arrested, two men approached Arenas, put a gun to his head and forced him into his truck. The two men asked Arenas why he "snitched on the homies" and began wondering out loud what they should do with him. After some time had passed, one of the men told Arenas to go to the district attorney and have the charges dropped. Arenas assured the two kidnappers he had already done so.

The two men then dropped Arenas off at a friend's house and told Arenas to wait there while they spoke with "higher up" gang members about what they should do with Arenas. Once he was not being watched, Arenas fled the house and contacted Detective Kevin Townsend. Shortly thereafter, the two men who had kidnapped Arenas, also members of the Eastside Riva gang, were arrested. They later pled guilty to the kidnapping.

At trial, Detective Townsend testified as a gang expert about gang activity in the city of Riverside. Townsend stated the Eastside Riva was one of the largest and most violent criminal street gangs in Riverside with approximately 500 members. Townsend further testified the Eastside Riva gang commits the crimes listed in section 186.22, subdivision (e), specifically: drug sales, burglaries, auto theft, robberies, witness intimidation, possession of firearms and crimes of violence, including murders and stabbings. Townsend also stated that the location of the assault on Arenas was within Eastside Riva gang territory.

Additionally, Townsend testified street gangs demand loyalty and respect. He stated that the notion of respect is important to Eastside Riva gang members and is often earned by committing violent crimes in broad daylight for others to see. These violent crimes work to deter the community from calling the police, coming to court, testifying and thereby allow the gang to operate freely and unhindered. Townsend explained Ram and Ramirez were both self-admitted members of the Eastside Riva gang and both had extensive gang tattoos all over their bodies.

## DISCUSSION

### I

#### *Sufficient Evidence Supports the Jury's Finding Ram Committed the Crimes for the Benefit of the Gang*

Ram first argues there was insufficient evidence to support the jury's finding he committed the assault and robbery for the benefit of the Eastside Riva gang within the meaning of section 186.22, subdivision (b). Our review of the record discloses ample evidence the beating and robbery of Arenas were for the benefit of the gang.

In the absence of any prejudicial error, we must affirm a jury verdict supported by substantial evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Substantial evidence is evidence of legal significance, reasonable in nature, credible and of solid value. (*People v. Samuel* (1981) 29 Cal.3d 489, 505.) We must review the entire record in the light most favorable to the verdict and presume the existence of every fact which supports the verdict and which the trier could reasonably deduce from the evidence. If

the evidence permits a reasonable trier of fact to conclude a charged crime was committed or an enhancement was proven, the opinion of a reviewing court that the circumstances may also be reconciled with a contrary finding will not warrant reversal. (*See Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781].)

Section 186.22, subdivision (b)(1) provides a sentence enhancement for a person convicted of a felony that was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The California Supreme Court in *People v. Albillar* (2010) 51 Cal.4th 47, made it clear the statute only requires a showing of intent to assist another gang member in a criminal activity and that a gang expert's testimony is sufficient to establish such an intent. (*Id.* at pp. 60-61.)

Here, the prosecution's gang expert, Detective Townsend, had well-established experience and expertise with respect to the Eastside Riva gang. Townsend was able to positively identify the gang's territory, tattoos and criminal behavior.

Townsend noted the assault and robbery took place in the front yard of Ramirez's house, located in gang territory, in broad daylight for all to witness. Townsend explained to the jury that a gang's general criminal effectiveness is greatly enhanced by the intolerance of its members for any type of disrespect of its members. According to Townsend, retaliation for an affront is not simply a matter of personal pride but an effective means of discouraging interference with gang members and their present or future gang related criminal activities. In this regard Townsend's testimony is consistent

with the views expressed by gang experts in other gang cases. (*See e.g., People v. Gardelely* (1996) 14 Cal.4th 605, 613; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1367.)

Given Townsend's testimony, it was reasonable for the jury to conclude that in the gang context retaliation for lack of respect was not simply a matter of personally "saving face," but was performed with the very specific intent of regaining respect for the gang and thereby protecting the criminal effectiveness of the gang itself. In particular, we note Ram committed the assault and robbery in concert with another self-admitted Eastside Riva gang member, Ramirez, while lecturing Arenas "this is how we do it." Even if Ram possessed the simultaneous personal motive of beating up Arenas because Arenas disrespected Ramirez, the existence of such a simultaneous personal motive would not defeat the gang finding. (*See People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.)

In sum, we reject Ram's argument the record does not contain sufficient evidence to support the finding of the gang enhancement.

## II

### *The Trial Court Properly Admitted Arenas's Testimony Concerning His Kidnapping*

Ram next argues the trial court should have precluded Arenas's testimony concerning his kidnapping because the prosecution did not comply with sections 1054.1 and 1054.7. In particular, Ram argues that because the prosecution did not provide

defense counsel with a copy of the police report concerning the kidnapping 30 days before trial, Arenas's kidnapping testimony should have been precluded.

*A. Background*

Prior to trial, the prosecution moved to admit evidence members of the Eastside Riva gang kidnapped Arenas to discourage him from testifying. The prosecutor argued the evidence was needed to prove the gang allegations. The trial court denied the motion, finding the kidnapping evidence was irrelevant. However, the trial court did note that "if something comes up that changes it, we'll discuss it."

During the defense case-in-chief, Teresa Torrez, Ram's fiancée, testified that on many occasions Arenas told her Ram was innocent and he was not pressing charges against him. In response to Torrez's testimony, the prosecution asked for permission to cross-examine Torrez about the kidnapping and witness intimidation. The prosecution argued this line of questioning would explain why Arenas may have told Torrez that Ram was innocent and that Arenas was dropping the charges. The trial court refused to permit the prosecution to use its cross-examination of Torrez as a means of introducing evidence about the kidnapping. However, the trial court permitted the prosecution to call Arenas to testify about the kidnapping because the kidnapping had become relevant as evidence of Arenas's state of mind when he spoke to Torrez.

The defense objected to such testimony from Arenas on the grounds it had not received any discovery concerning the kidnapping case. In response, the prosecution produced for the defense the police report on the kidnapping. Notwithstanding receipt of



the police report, the defense counsel renewed his objection, arguing he did not have enough time to review the 30-page police report which discussed witnesses, recordings of jail calls and a 911 tape. Defense counsel asked that the trial be continued so that counsel could thoroughly review the police report. The trial court provided defense counsel with one hour to review the police report and prepare for cross-examination of Arenas and denied the motion to continue the trial. The trial court noted that the kidnappers had pled guilty, that the jail calls were irrelevant to Arenas's state of mind and his testimony would not be a retrial of the kidnapping case.

Arenas then testified about the kidnapping and, both on direct examination and when cross-examined, denied he ever told Torrez Ram was innocent. After Arenas testified, the trial court instructed the jury the kidnapping was "not to be in any way attributed to the defendant and may not be considered against him. It is only received into evidence to show it's [sic] effect, if any, on what Mr. Arenas may or may not have said to Mrs. Torrez in 2009."

#### *B. Legal Principles*

Section 1054.1, subdivision (f), requires the prosecution to disclose "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecution intends to call at the trial." (Italics added.) Section 1054.7 provides in pertinent part that the disclosures required by section 1054.1 "shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. *If the material and information becomes known to, or*

*comes into the possession of, a party with 30 days of trial, disclosure shall be made immediately . . . .*" (Italics added.)

Section 1054.5, subdivision (b) provides the trial court may enforce the disclosure requirements of section 1054.1 by ordering immediate disclosure, "contempt proceedings, delaying or prohibiting the testimony of a witness, or the presentation or real evidence, continuance of the matter, or any other lawful order." However, "the court may prohibit the testimony of a witness pursuant to subsection (b) only if all other sanctions have been exhausted." (§ 1054.5, subd. (c).) Before imposing any exclusion of testimony or evidence as a means of preventing prejudice to a defendant, a trial court must carefully weigh the cost to the truth-finding process of excluding otherwise relevant and probative evidence. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1747.) Consequently, exclusion is warranted as a remedy only when the prejudice caused by a failure to disclose is substantial and irremediable. (*Ibid.*) We review the trial court's decision regarding enforcement of the discovery required by section 1054.1 for abuse of discretion. (*People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792.)

### C. Analysis

The first difficulty we have with Ram's discovery argument is his contention that a violation of section 1054.1 occurred. Under section 1054.1, the prosecution was only required to produce relevant reports and statements. As we have discussed, the information in the kidnapping police report did not *become* relevant until Torrez took the

stand and testified about Arenas's statements to her. Thus, under a reasonable interpretation of sections 1054.1 and 1054.3, the prosecution here had no prior duty to disclose the police report, and its immediate production of the police report following the trial court's order permitting Arenas to testify about the kidnapping fulfilled its obligations under the statutes.

Moreover, even if earlier disclosure of the police report was required, the trial court fully vindicated Ram's rights under the discovery statute by providing his counsel additional time to prepare for Arenas's cross-examination. As the trial court noted, the defendants in the kidnapping case pled guilty and culpability for the kidnapping was not an issue in Ram's trial. Thus it was not likely the police reports were going to produce any significant impeachment with respect to what was an entirely collateral issue. In this context, Ram cannot show that, even if a violation of section 1054.1 occurred, the midtrial production of the police report, with an hour's opportunity to review it and prepare for cross-examination, created the substantial and irremediable prejudice which would warrant exclusion of Arenas's testimony.

*D. The Trial Court Erred in Imposing Sentences For Both The Robbery and Gang Count Convictions*

Ram next argues the trial court should have stayed sentencing on his gang participation conviction under section 654.<sup>3</sup> The question of whether a defendant may be

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<sup>3</sup> Penal Code section 654, subdivision (a) provides in relevant part; "An act or omission that is punishable in different ways by different provisions of law shall be

sentenced both for gang participation under section 186.22, subdivision (a) and for the substantive crime which serves as the predicate to a gang participation conviction was recently resolved by our Supreme Court in *People v. Mesa* (June 4, 2012 S185688) \_\_\_\_ Cal.4th \_\_\_\_ [2012 WL 1970864] *Mesa*).

In *Mesa* the Supreme Court found that when in a single proceeding a defendant is convicted of a substantive offense and the substantive offense is the predicate to a gang participation conviction under section 186.22, subdivision (a), imposition of a sentence on the offense with the shorter potential term must be stayed under section 654. (*Mesa*, *supra*, \_\_\_\_ Cal.4th at p. \_\_\_\_.) The Attorney General agrees that in light of *Mesa*, the sentence on Ram's gang participation conviction should have been stayed under section 654. Accordingly, we will modify the judgment to stay Ram's sentence on the gang participation conviction. (See *People v. Flowers* (1982) 132 Cal.App.3d 584, 589.)

#### IV

##### *The Trial Court Properly Imposed Concurrent Sentences For Ram's Robbery Count and Assault With A Deadly Weapon Count*

Finally, Ram argues the two-year sentence imposed for the assault under section 245, subdivision (a)(1)(2) should also be stayed under section 654 because the trial court imposed a concurrent sentence on the robbery count. Ram argues that because the assault

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punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

was committed for the same purpose as the robbery—to teach Arenas a lesson in respect—the trial court was required to stay the sentence for assault.

In *Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*), disapproved on other grounds *People v. Correa* (2012) \_\_\_\_ Cal.4th \_\_\_\_ 2012 WL 7344999, the California Supreme Court outlined section 654's prohibition on multiple punishment for offenses incident to one criminal objective, with specific reference to cases involving a robbery during which an assault was committed: " 'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' [Citation.] [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.

"Thus in *People v. Logan* [1953] 41 Cal.2d 279, 290, the defendant, who chose to commit robbery by first knocking out his victim with a baseball bat and then taking his valuables was convicted of both robbery and assault. [The Supreme Court] reversed the assault conviction on the ground that the double punishment violated section 654. In *In re Chapman* [1954] 43 Cal.2d 385, 387, however, [the Supreme Court] held that when the assault is not a means of perpetrating the robbery but is an act that follows after the

robbery is completed the defendant is guilty of two punishable acts." (*Neal, supra*, 55 Cal.2d at pp. 19-20.)

In the wake of *Neal*, courts have repeatedly held that "if an assault is committed *as the means of* perpetrating a robbery, section 654 requires the sentence for the assault to be stayed." (E.g., *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171, italics added.) In contrast, "When there is an assault *after* the fruits of the robbery have been obtained, and the assault is committed with an intent other than to effectuate the robbery, it is separately punishable." (*Ibid.*)

Turning to the record here, there is no evidence Ram's or Ramirez's initial intention was to rob Arenas. Rather, the record shows the conflict arose from Arenas's perceived "disrespect" of Ramirez, who went back in the house and retrieved Ram to assist him in assaulting Arenas. Significantly, at no time did Ram or Ramirez threaten Arenas with assault if he did not give them his money. Rather, Ram and Ramirez beat Arenas for two to three minutes until Arenas was on the ground pleading for mercy. Only after the assault was complete did one of the assailants, as an apparent afterthought, rob Arenas. Given this course of conduct, it was reasonable for the trial court to conclude the intent to rob was separate from the assault and only arose after the assault was completed and the two men realized how vulnerable Arenas had become. Because the record supports the trial court's apparent conclusion that each crime arose from a separate intent, section 654 did not prevent the trial court from punishing both the assault and the robbery.

## DISPOSITION

The judgment is modified to stay the two-year sentence on Ram's gang participation conviction and as modified the judgment is affirmed.

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BENKE, J.

WE CONCUR:

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McCONNELL, P. J.

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McDONALD, J.